The Use of Mediation in Small Claims Courts*

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* This Article is based on a Report prepared in 1992 under a contract between the University of San Francisco School of Law and the Judicial Council of California/Administrative Office of the Courts ("USF Report"). The Judicial Council requested the principal consultants, Folberg, Rosenberg, and Barrett to undertake a study of alternative ways of adjudicating or resolving civil actions within the jurisdiction of the small claims court, either by referral to alternative dispute resolution (ADR) programs or by handling them through an administrative procedure.

Specifically, the consultants were asked by the Judicial Council to identify and survey counties in California that either used ADR programs for small claims cases or had developed ways of handling small claims other than through adjudication by a judge. The report was to include the key features and the effectiveness of such programs. The consultants were also asked to gather similar information about other states that had non-adjudicative programs in order to help determine if there are models or approaches that might be used in California. Finally, the consultants were to suggest to the Small Claims Committee of the Judicial Council procedures and criteria for referral of small claims to ADR or agency programs and to make other recommendations pertaining to improvement of procedures in resolving and collecting small claims.

This adaptation of the USF Report reflects the authors' attempt to focus more particularly on the implementation of mediation in small claims courts. Specific sections of this Article are the product of Susan E. Raitt and may not reflect the views presented in the consultants' report or the views of individual members of the Small Claims Committee, the Committee Chair, or the Judicial Council. Susan E. Raitt was assisted generally by Professor David Scalise of the McLaren School of Business and Dean Jay Folberg of the University of San Francisco School of Law. She also wishes to acknowledge the support of Wadih Homsi.

The USF Report and its various appendices, in full, are on file at the California Judicial Council, Administrative Office of the Courts.

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I. INTRODUCTION

A. Small Claims Courts Today

Filings in small claims courts are booming.[1] Small claims case filings make up approximately forty percent of all civil case filings in limited jurisdiction state courts and twenty-seven percent of all civil case filings in general jurisdiction state courts.[2] The small claims court caseload in California increased by approximately 40,000 from 1990 to 1992.[3] Increases in the jurisdictional limitations of small claims courts have contributed to increases in small claims caseloads,[4] along with other factors, such as the popularity of the TV show, "The People's Court."[5] In most states, the monetary limits have doubled or tripled in the past

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1. For example, a total of 548,373 cases were filed in the small claims courts of California during Fiscal Year 1991-92. 1993 JUDICIAL COUNCIL OF CALIFORNIA ANN. REP., Vol. II, at 86. During 1991-92, small claims filings increased six percent in California while other civil filings decreased slightly. *Id.*

2. JOHN A. GOERDT, STATE JUSTICE INSTITUTE, SMALL CLAIMS AND TRAFFIC COURTS: CASE MANAGEMENT PROCEDURES, CASE CHARACTERISTICS, AND OUTCOMES IN 12 URBAN JURISDICTIONS xi (1992).

3. 1993 JUDICIAL COUNCIL OF CALIFORNIA ANN. REP., VOL. II, at 86. It should be noted that the number of small claims filings has varied both up and down during the past 10 years. *Id.*

4. One researcher has estimated that an increase of twenty-three percent in the jurisdiction limit will result in a four percent increase in small claims filings. GOERDT, *supra* note 2, at 5 (citing Thomas Marvell, *Caseload Growth - Past and Future Trends*, 71 JUDICATURE 151, 158 (Oct.-Nov. 1987)). It is also possible, as small claims ceilings are elevated, that the character of the cases brought to small claims courts may change as well (e.g., more personal injury cases). *Id.*

The State of California reports that since the jurisdictional limit for their small claims courts was raised to $5,000, usage of these courts has increased. But it also notes that "counter-balancing this trend is the increasing public acceptance and use of non-adjudicatory dispute settlement procedures, particularly mediation." 1 CONSUMER LAW SOURCEBOOK FOR SMALL CLAIMS COURTS, CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS iii (1991) [hereinafter CONSUMER LAW SOURCEBOOK].

5. Other articles have noted a possible correlation, since 1981, between the increase in the small claims courts' caseloads and the fact that "The People's Court" television program began running that same year. Carolyn H. Crowley, *Consummate Consumer; Suit Yourself; Small Claims Court May be the Answer*, WASH. POST, July 14, 1992, at C5; Reynolds Holding, *Larger Small Claims: "Little Guy's Court" Goes Big Time*, S.F. CHRON., Feb. 13, 1992, at A1. Judge Abner J. Mikva of the U.S. Circuit Court of Appeals for the District of Columbia said Judge Wapner encourages litigiousness. *Jurisprudential Innovations*, THE NAT'L L.J., April 30, 1990, at S2. One show "indicated it's OK to sue over two bucks' worth of pizza," Judge Mikva complained. "The fact is, it's not OK." *Id.*

decade.[6]

Small claims courts are deserving of attention not only because of their voluminous use, but also because of their importance to individuals and businesses alike.[7] In addition to providing a forum for claims by individuals, these courts are a "relatively expeditious and inexpensive means" for both small and large businesses to compel debtors to fulfill their contractual obligations.[8]

Small claims cases generally fall into the following broad categories: 1) breach of contract/breach of warranty, 2) negligence, 3) defective products, 4) intentional misconduct, and 5) violations of statutes designed to protect consumers.[9] More specifically, the court is used for consumer complaints, e.g., cases involving: auto repairs, personal injuries or accidents, construction and home improvement disputes, landlord-tenant security deposits, debt collection matters where the defendant is likely to default (for example, liquidated debts), collection matters where the defendant is likely to want to negotiate a repayment schedule, dishonored checks, employment matters, trespass, nuisance and other matters between neighbors, and miscellaneous other matters.[10]

It is interesting to note that while businesses file most of the complaints in small claims courts, individuals are much more likely to be the plaintiffs in small claims trials. On average, businesses file approximately sixty-five percent of all small claims complaints.[11] A

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6. 1986 NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANN. REP. 5. Small claims courts' jurisdiction in California increased from $2,500 to $5,000 effective January 1, 1993. The current jurisdictional limit in California is $5,000. Because the complaints can be joined, the collective damages awarded can exceed these limits. For example, in May of 1991, 41 Haight-Ashbury neighborhood residents won more than $160,000 from the owner of a rooming house where drug use, fights, and noise were common. Holding, *supra* note 5, at A1.

7. However, the principles underlying the small claims process in most states focus on the individual. For example, in California, the small claims court constitutes a "fundamental element in the administration of justice and the protection of the rights and property of individuals." Small Claims Act, CAL. CIV. PROC. CODE § 116.120 (West Supp. 1993). The small claims court must operate to "ensure that the convenience of parties and witness *who are individuals shall prevail*, to the extent possible, over the convenience of any other parties or witnesses." *Id.* (emphasis added).

8. GOERDT, *supra* note 2, at xi.

9. Crowley, *supra* note 5, at C5.

10. JOSHUA ROSENBERG ET AL., USF FINAL REPORT TO THE JUDICIAL COUNCIL 6 (1992) [hereinafter USF REPORT].

11. GOERDT, *supra* note 2, at xv. The numbers vary from state to state. The breakdown of percentages of filings in California is as follows: businesses, forty-six percent; individuals, twenty-two percent; government agencies, ten percent; medical persons and institutions, seven percent; landlords, five percent; and tenants, four percent. CONSUMER

substantial percentage of these claims, mostly involving debtor collection, are disposed of by a default judgment uncontested by the defendant.[12] On the other hand, seventy-one percent of the small claims cases resolved at trial are brought by individual plaintiffs.[13] So "[i]f one views the small claims *trial* as the ultimate forum for resolving conflicts among individuals and between individuals and businesses, then the small claims court is [still] primarily a 'people's court.'"[14]

However, because more people are now working out of their homes,[15] many of these "individuals" also qualify as sole proprietorships. Regardless of how the disputants are characterized, the small claims court appears to be the ultimate forum for individuals and businesses to "redress grievances expeditiously and inexpensively against [other] businesses or . . . individuals."[16]

B. The History and the Reforms of Small Claims Court

For almost a century, the small claims court itself has provided a form of alternative dispute resolution (ADR) in the United States. Originating in the United States in 1913,[17] the small claims court was established primarily as a "means for small businesses and laborers to collect money from borrowers or employers through a process that was faster, less formal, and less expensive than traditional civil litigation."[18]

The consumer justice reform movements of the 1960s and 1970s brought renewed research and interest in the small claims courts.[19] This movement "emphasized the need for reform of small claims courts to

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LAW SOURCEBOOK, *supra* note 4, at iii. Individuals are sued in approximately sixty percent of the cases, businesses in about twenty-seven percent, tenants in about five percent, and landlords in about four percent. *Id.*

12. GOERDT, *supra* note 2, at xv.

13. *Id.*

14. *Id.*

15. Laura Mansnerus, *Be Your Own Lawyer in Small-Claims Court*, N.Y. TIMES, Jan. 9, 1993, at 36.

16. GOERDT, *supra* note 2, at xi.

17. Carl R. Pagter et al., *The California Small Claims Court*, 52 CAL. L. REV. 875, 877 (1964). This first court was in Cleveland.

18. GOERDT, *supra* note 2, at 4 (citing Steven Weller & John C. Ruhnka, *Small Claims Courts: Operations and Prospects*, 2 STATE CT. J. 24 (1978)).

19. Barbara Ingvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219, 221 (1975).

facilitate the adjudication of consumer grievances."[20] Although "consumer justice reformers" were concerned that businesses and corporations were "more likely to use attorneys in small claims courts . . . placing inexperienced individual defendants at a disadvantage," studies showed that "defendants with an attorney were more likely than unrepresented defendants to win against plaintiffs, whereas plaintiffs without attorneys did just as well as represented plaintiffs against unrepresented defendants."[21] The result was an appraisal of the need to bar attorneys and collection agencies from the small claims courts.[22]

Since then, legislation in numerous states, such as California, has limited the use of attorneys in the small claims courts[23] and also limited the use of these courts by collection agencies.[24] Suggestions made, which have not yet been acted upon, include the division of the small claims dockets to handle business and individual claims separately.[25]

There have also been reforms specifically aimed at improving accessibility to the small claims courts, including scheduling trials and office hours during evenings and weekends and developing small claims public information and education programs and materials.[26]

However, there is still much room for improvement in the small claims court system. For instance, while adjudication of small claims is an efficient process, at times it may be too efficient to satisfy the parties.[27] Parties often relate that they were rushed and felt intimidated by the process, did not have sufficient time to tell their side of the case, were unable to summarize the key facts of their stories, and did not believe that they were in fact understood.[28] Also, there is little time for the court or for the parties in the adjudication of small claims cases to

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20. *See* GOERDT, *supra* note 2, at 4 (citing CONSUMER COUNCIL, JUSTICE OUT OF REACH: A CASE FOR SMALL CLAIMS COURTS (LONDON: HER MAJESTY'S STATIONERY OFFICE 1970); NATIONAL INSTITUTE FOR CONSUMER JUSTICE, STAFF STUDIES ON SMALL CLAIMS COURTS (1972); CHAMBER OF COMMERCE OF THE UNITED STATES, MODEL CONSUMER JUSTICE ACT: A PROPOSED MODEL SMALL CLAIMS COURT ACT FOR STATE LEGISLATURES (1976)).

21. GOERDT, *supra* note 2, at 4 (citing JOHN RUHNKA ET AL., SMALL CLAIMS COURTS: A NATIONAL EXAMINATION 69 (1978)).

22. *Id.* at 5.

23. CAL. CIV. PROC. CODE § 116.530 (West 1990).

24. CAL. CIV. PROC. CODE § 116.420 (West 1990).

25. Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 447 (1990).

26. *Id.* at 446-47. Several states require publication of a booklet that is readily understandable to a layperson.

27. USF REPORT, *supra* note 10, at 8.

28. *Id.*

focus on possible creative options for resolving their disputes. Where shortcomings are perceived, the public is seeking alternatives: Seventy-five percent of Californians surveyed want the courts of the future to establish community alternatives for resolving small disputes.[29] The courts apparently have the same objective. Of those court personnel (including judges, administrators, small claims program directors and advisors) surveyed in the USF Report, the vast majority expressed a desire for help in developing more efficient and more equitable means for resolving small claims cases.[30]

Therefore, the focus has shifted from traditional reforms to mediation and other ADR processes.[31] The ADR processes currently used by many small claims courts are seen as a possible solution to the above mentioned problems.[32] This Article examines the use of mediation in the small claims courts in the U.S. as a whole, and more particularly, in California. It specifically assesses whether these programs have been successful, analyzes potential problems with these programs, and makes recommendations on how the small claims courts could better use ADR.[33]

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29. *Qualified Judges, Equal Treatment Desired of Courts*, COURT NEWS, Dec. 1992 - Jan. 1993, at 7.

30. USF REPORT, *supra* note 10, at 1; *see also* Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343, 357, 366 (1992) (citing an earlier Report made to the Judicial Council (that small claims, along with personal injury, civil harassment, landlord-tenant, and driving under the influence cases, are among those foremost on the minds of judges intent on case management)).

31. *See* Elwell & Carlson, *supra* note 25, at 451-52 (citing Steele, *The Historical Context of Small Claims Courts*, AM. B. FOUND. RES. J. 293, 356 (1981)).

32. Holding, *supra* note 5, at A1; Elwell, *supra* note 25, at 452 n.119 (citing D. GOULD, STAFF STUDIES NO. 3 PREPARED FOR THE NATIONAL INSTITUTE FOR CONSUMER JUSTICE 248 (1972) ("Many cases that end up in the small claims courts need a referee more than an adjudicator. Many combatants will willingly settle a case once a neutral figure imbued with some authority steps in to pull combatants apart and arrange a mutually acceptable settlement.")).

33. Although this article only examines ADR in the small claims court system in the United States, the use of ADR in small claims courts is becoming an international phenomenon. *Anderson Calls for Access to Justice*, CANADA NEWSWIRE, Nov. 16, 1992, at Domestic News.

II. OVERVIEW OF MEDIATION PROGRAMS IN SMALL CLAIMS COURTS

A. Reasons for the Development of Mediation in Small Claims Courts

Numerous factors have led to the development of mediation[34] programs in small claims courts over the past decade. First, there are the cost savings for the courts themselves. Mediators can "clearly reduce the amount of judge time the court must assign to small claims calendars" by settling a substantial percentage of trial-ready cases.[35] Additionally, although in some instances there may be a paid mediation coordinator in the court, most mediation programs use volunteer mediators, resulting in a cost-effective alternative to judges or pro-tems.[36]

Second, mediation benefits the disputants. "Because mediation is less confrontational and less formal, it can provide a forum where parties will be more relaxed and have a greater opportunity to explain her or his side of the case."[37] In explaining their positions to a third party neutral, the parties can vent their pent-up feelings. This psychological release often pinpoints the principal obstacle to settlement - the emotional component underlying the conflict.[38] Once feelings about the conflict are expressed, the pathway to settlement is often open.[39] Mediation may also provide a means for a defendant or plaintiff to negotiate a more satisfactory settlement than might be obtained in a court where a judgment is more likely to be a "win-lose" situation.[40] Mediation promotes bargaining, and the mediator can help the parties invent options for mutual gain by making concessions on less important issues to gain ground on issues they view as most important.[41]

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34. Mediation is a process in which the parties, with the assistance of a neutral person, attempt to reach a consensual resolution. JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 7-9 (1984).

35. GOERDT, *supra* note 2, at 23.

36. Use of quasi-judicial staff, such as pro-tems, for adjudicating small claims cases is also increasing; the majority of California courts use such quasi-judicial staff. *See* USF REPORT, *supra*, at 5, regarding increased use of pro-tems; *see also* GOERDT, *supra* note 2, at 6 (Nine of the twelve courts in the Ruhnka study used quasi-judicial staff rather than regular judges to adjudicate small claims cases.).

37. GOERDT, *supra* note 2, at 24.

38. John Bates, Jr., *Using Mediation to Win for Your Client*, 38 PRAC. LAW. 23, 25 (1992).

39. *Id.*

40. GOERDT, *supra* note 2, at 24-25.

41. Bates, *supra* note 38, at 26 (citing ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 76-78 (1983)).

Mediation may be able to help smooth out the potential one-sidedness of cases filed by more "sophisticated" businesses. The perception is that businesses that file large numbers of small claims cases have become very professional in the way they adjudicate small claims cases, whether they use a collection agency or their own collections office staff.[42]

One of the reasons that businesses substitute mediation and arbitration for litigation is to promote settlement of commercial disputes without destroying continuing business relationships.[43] This reasoning applies to businesses of all sizes as well as to individuals.

It is also hoped that by increasing the use of mediation in small claims cases, the collectability of judgments may be enhanced.[44] Even though plaintiffs win a large percentage of cases, many judgments are never collected. The inability to collect on judgments may be more frustrating to plaintiffs than all of the procedures proceeding the judgment. "If mediation can lead to a more satisfactory settlement, one that is more likely to be collected, plaintiffs who would expect to win at trial stand to benefit from mediation as well."[45]

B. The Use of Small Claims Mediation

As mentioned above, the small claims court was established as an alternative dispute resolution forum in the early part of this century. "Small claims court procedures are less expensive, faster, and less formal

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42. GOERDT, *supra* note 2, at 23-24.

43. Bates, *supra* note 38, at 26. ADR is widely used by stockbrokers, construction contractors, and health-maintenance organizations and is gaining in popularity among banks, oil companies, and a number of other businesses. Jamie Beckett, *Settling Disputes in Private: Arbitrators Save Time and Money*, S.F. CHRON., Jan. 25, 1993, at C1. One hundred and forty-two companies that avoided court and used ADR saved a total of more than one hundred million in legal costs from disputes concluding in 1990. *Id.* at C6 (citing a study by the Council for Public Resources, a New York-based nonprofit group).

However, the forced nature of many of the companies' contracts specifying the use of ADR has led some to charge that, in some instances, the process has been taken too far. Some examples include workers being required to arbitrate all disputes, even those involving violations of federal laws barring employee discrimination, wrongful termination, or sexual harassment. *Id.* at C6. These call into question the constitutional right to a trial by jury. *Id.* Once the voluntariness is taken out of these alternative approaches to handling disputes, an essential part of the process is gone. "The essence of arbitration is the willingness of both parties to enter into it and abide by the ruling," said a San Francisco attorney, "It's like sex. It may be great between consenting adults, but it's not OK if one party is forced." *Id.*

44. *See generally* Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984).

45. GOERDT, *supra* note 2, at 25.

than the regular civil litigation process. It is very interesting, therefore, that [many] jurisdictions now have some form of mediation program for small claims cases."[46] Approximately twenty states use some form of alternative dispute resolution in their small claims court system.[47] Most of these courts are using or experimenting with mediators to reduce the number of trials.[48]

1. Categories of Small Claims Mediation Programs

The USF Report described seven areas by which small claims and ADR programs in the United States can be categorized.

a. Sponsorship

Programs can be divided generally into two categories: i) court-based programs where mediation is done as "an arm of the court" and ii) programs that operate independently but receive referrals from the court.

b. Timing

The timing of mediation generally falls into one of three categories: i) prior to filing, ii) after filing of a claim but before the date set for a judicial hearing, and iii) on the date set for hearing, just prior to the hearing.

c. Location

Programs may be held i) at the courthouse or ii) in other facilities, including community rooms, mediation center conference facilities, church meeting rooms, law schools, or other noncourt locations.[49]

d. Choice

In most small claims mediation programs participation is voluntary, but in some jurisdictions, the courts have made mediation

46. *Id.* at 23-24.

47. USF REPORT, *supra* note 10, at 20-46.

48. *Id.* at 2.

49. GOERDT, *supra* note 2.

mandatory; in such cases, whether a claim is settled remains, of course, voluntary.

e. Disposition

Most mediation programs, particularly those that are court-connected, have a procedure for making any settlement agreement a judgment of the court; in other programs, settlements rely on the mutuality of promises and the good faith of the parties to assure compliance.

f. Qualifications

There are a variety of ways to assure that mediators will be qualified. None of the programs surveyed required that all mediators be attorneys, and most drew their mediators from the community population. Mediators generally received training lasting between twenty and forty hours, although some programs had more formal requirements.

g. Length

Most programs reported that mediation sessions averaged about one hour in length, although some cases might take as little as twenty minutes and others up to three hours to reach a resolution.

2. *Chart of U.S. Small Claims Mediation and Arbitration*

Those states using some form of ADR are as follows:[50]

	MEDIATION	ARBITRATION	BOTH
Alaska			x
Arizona			x
California			x
Colorado	x		
D.C.	x		
Florida	x		
Georgia	x		
Hawaii	x		
Illinois	x		
Louisiana		x	
Maine	x		
Michigan			x
Minnesota	x		
New Hampshire	x		
New Jersey	x		
New Mexico	x		
North Carolina	x		
Ohio	x		
Oklahoma	x		
Oregon	x		
Vermont	x		
Wisconsin	x		

3. *Examples of Small Claims Mediation Programs*

Four states showing the variety of use of ADR in the small claims courts are Arizona, Colorado, Oregon, and California.[51]

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50. USF REPORT, *supra* note 10, at 20-46. This information was compiled in a series of telephone interviews conducted between January and May of 1992 by Ernest Eastman and Susan Raitt.

51. USF REPORT, *supra* note 10, at 20-46 (The programs in these states, along with approximately 15 others, were analyzed. The information was gathered through a survey and phone discussions with court clerks, administrators, mediators, professors, and judges.).

a. Arizona

The Arizona Justice Courts, which handle small claims, have two separate mediation programs in place and two continuing pilot programs. All four of these programs rely on unpaid volunteer mediators who are recruited and trained through the Office of the Attorney General.[52]

In one of the Arizona small claims courts, once a plaintiff files his or her case, the complaint is reviewed by a judge, case counsel, or court clerk, who decides whether the case is appropriate for mediation. If it is appropriate, a mediation date is set and a form is mailed to the plaintiff directing him or her to appear for mediation at the court. If the mediation is not successful, the parties have the option to proceed to trial.

In another Arizona program, claimants appearing for their court dates may be directed by the judge to a volunteer hearing officer, described as a quasi-arbitrator. This program relies on a pool of volunteer hearing officers who move from court to court and are available to cope with overflows in a particular courtroom. The hearing officers have been trained to hear small claims cases and render final and binding decisions.

In addition, some Arizona Justice Courts are participating in multidoor courthouse pilot projects. When the Arizona small claims courts' jurisdictional levels were increased to $1,500, the case loads of the small claims courts increased. The legislature passed major ADR legislation, some of which established an ADR fund, designated to be used to expand ADR through the use of pilot projects. Each pilot project is initially testing one hundred cases.

b. Colorado

Four Colorado counties have mediation programs in their small claims courts.[53] Referrals by the courts to the mediation programs are made on a case-by-case basis. Three of the programs rely on volunteer mediators. Of these, one program uses services provided by students at a local law school who have received ADR training. The fourth program relies on private sector mediators selected by the parties.

In Denver, one of the four mediation counties, the disputants appear in court for trial and are told by the judge at the beginning of the day that they should go into the hallway and try to settle the case by themselves. If a settlement is not reached, the judge determines whether

52. *Id.* at 21-22.

53. COLORADO JUDICIAL INSTITUTE, ALTERNATIVE DISPUTE RESOLUTION PROJECT, INTERIM REPORT, ch. 2. (1991).

the case is suitable for mediation. If it is suitable, mediation is either suggested or ordered by the judge.[54] Typically, law students co-mediate the cases.[55] If students are not available, volunteer members of the community are available to pick up the slack. All such volunteers have received mediation training but, in general, are not experienced mediators.

As part of their mediated agreement, the parties must determine whether the stipulated outcome will be entered as a court judgment. Parties are allowed to stipulate that there will be no judgment if payments are made as agreed but that a judgment may be entered for a specific amount if payment is not made on time. Occasionally, an additional, penalty sum may be added. The Denver courts consider this program to be a success, and the state is considering expanding this type of approach to other counties in the state.

c. Oregon

Multnomah County, Oregon's most urban county, which includes Portland, has a well-established, court-based mediation program. Among the jurisdictions surveyed, this program is unique in several ways. First, the program has had in place a program of mandatory mediation for small claims cases since May 15, 1989.[56]

Because the mediation program began "from the ground up," careful and thorough statistics have been recorded to evaluate the program. For example, in the first twenty-seven and one-half months of the program's operation, over 27,000 small claims cases were filed. Of those, 4,200 progressed to the hearing stage. Of the cases where both parties appeared, seventy-five percent went to mediation, and over fifty percent of those referred resulted in settlement.[57]

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54. While fault-oriented disputes or those involving issues of liability, such as car accident cases, are not delegated to mediators, damage cases are. There are differing views in the Denver program as to what types of disputes may be handled by the mediators. Some state that, with the exception of cases involving violence, wholesale referrals of cases to mediation are appropriate. But it is often difficult to determine, simply from the complaint, what the central issues really are. Telephone conversation with Professor Cindy Savage, University of Denver Mediation and Arbitration Center, in February, 1992.

55. The University of Denver College of Law funds a Mediation-Arbitration Center that provides training for the school's mediation and litigation students. Under the supervision of faculty members, the students mediate and arbitrate actual cases, including those from the County Court, which has a monetary jurisdictional limitation of $10,000 and the small claims court, which has a jurisdictional limit of $5,000. *Id.*

56. SMALL CLAIMS MEDIATION PROJECT ANNUAL REPORTS, Multnomah County, Oregon (1991, 1992).

57. *Id.*

In general, after a petitioner has filed a complaint and the defendant has responded, a hearing date is set for approximately three weeks later. If both parties appear for the hearing, the case is referred to a mediator. If witnesses are involved, the parties may elect to mediate or go directly to trial.

Small claims court hearings and mediations are held in the afternoon, three days per week. All litigants report to the same courtroom and are given information sheets with information for small claims litigants and the goals and guidelines of mediation. When their cases are called, the litigants are assigned to a volunteer mediator and are escorted to a mediation room in the courthouse.

Information sheets advise the parties of two important facets of the program. First, unless agreed otherwise, any agreement reached through mediation is entered as a stipulated order, not as a judgment. The purpose is to protect the defendant's credit record. This condition has the effect of providing an incentive to settle rather than to litigate. Second, if a party fails to perform the terms of the mediation agreement, the other party can file with the court an affidavit that will convert the agreement to a judgment for the original amount of the claim.

Most mediation sessions run no more than one hour. The average is forty-five minutes. If an agreement is reached, the mediator completes a mediation agreement form which both parties read and sign. The mediator then signs the agreement, and the parties return to the courtroom where the judge reviews the mediation agreement and signs it.[58]

The Multnomah County Small Claims Project has been a leader in providing hands on, required training for its volunteer mediators. The thirty-two hour training program includes a copyrighted skills training manual, which was developed by an independent contractor especially for the project, court specific role plays, and videos.[59] Attorneys constitute a significant number of the selected mediators.[60]

d. California

In the USF Report's study of the California small claims courts, surveys were prepared and sent to the staffs of 167 municipal and justice courts in California.[61] One hundred and twenty-four (seventy-four

58. *Id.*

59. *Id.*

60. *Id.*

61. Names and addresses of these courts were provided by the California Judicial Council. A letter from Chief Justice Lucas of the California Supreme Court accompanied the surveys.

percent of courts surveyed) returned completed surveys. In addition, court personnel (including judges, administrators, small claims program directors, and advisors) from seven courts were interviewed.[62]

The survey revealed that in California, more than thirty courts currently utilize some form of alternative dispute resolution program in small claims cases.[63] However, the extent to which these programs are used, the way they are used, and their success varied significantly from court to court.[64] The extent of variation was evidenced by the fact that in several small claims ADR programs, litigants are not even aware of the ADR options until they are in court for a hearing, while in others, the ADR program is completed before a case is filed.[65] Some examples of the use of ADR in California small claims courts follow.[66]

i. Sacramento

Small claims disputants in Sacramento are informed at least twice about the possibility of using mediation to handle their claims. The Sacramento small claims court provides a small claims advisor, assisted by law students, to aid small claims disputants. One of the functions of the advisor and his or her assistants is to inform disputants of the mediation services available at the Sacramento Mediation Center, which conducts approximately 525 small claims mediations per year. The disputants may decide to proceed directly to the center to mediate their cases or may choose to file their cases with the small claims court.

If they do file their cases with the court, the parties are again informed about the benefits of mediation by the judge during the calendar call on the day their cases are scheduled for hearing. Willing disputants are then sent to an on-site mediator who attempts to help them resolve the matter. These on-site mediations are limited to one-half hour time periods, after which the disputants return to the courtroom. If a dispute is resolved within that period, the judge will dismiss the case, either with or without prejudice. If it is not resolved, the judge will hear the case.

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62. USF REPORT, *supra* note 10, at 1.

63. *Id.* at app. B, 48-64 (listing these courts).

64. *Id.* at 2.

65. *Id.*

66. *Id.* at 22-28 (The summaries of the selected California counties included here are based on personal interviews conducted between February and March 1992.).

ii. Santa Barbara

In Santa Barbara, a special Small Claims Court Project has been set up as an adjunct to the government-sponsored Community Services Mediation Program. In contrast to the Sacramento program, mediation is presented as an alternative to small claims disputants only after they have filed their cases and actually shown up in court. The judge asks the disputants during the calendar call if they would be willing to try to resolve their problems through mediation. Although the program is labeled as voluntary, the judge may use his or her discretion to compel claimants to participate by telling them that their cases will be heard by a judge only if they will first try mediation.

The parties who "choose" mediation are accompanied by a mediator to any available space in the courthouse for a mediation session. The sessions range from twenty minutes to a maximum of one hour. If the mediation is a success, the mediated agreement is presented to the judge, who proclaims it a judgment of the court. If the mediation is not a success, the judge hears the case. The Small Claims Court Project contacts disputants afterwards to determine the rate of compliance with mediated judgements versus court-rendered judgments. Their statistics show a "much higher rate of compliance" when mediation was used to resolve the dispute.

iii. San Mateo

In San Mateo, both the small claims advisors and mediation services staff are located in the Community Services office within the Housing and Community Services Division of the county government. The small claims advisory service consists of four employees who give advice to potential small claims disputants. After the advisors inform the parties about mediation as an alternative to the small claims court, the mediation service staff mails a form letter and information brochures to them.

If the disputants choose to mediate, the mediation center will select co-mediators and a location acceptable to the parties. The mediation sessions usually last one to three hours. Although most cases settle in one session, some need as many as four sessions to come to a resolution. If the mediation is successful, the parties sign an agreement stating the terms of the settlement. The mediators who guided the process or the center staff will follow up to determine compliance with the agreement. A survey recently conducted by the mediation services staff showed one-hundred percent of the mediated agreements in a particular time period had been honored. However, it appears that relatively few cases are referred

to mediation; while over 700 small claims cases are filed each month in San Mateo, only about twenty-five cases are mediated each month.

If the parties are unsuccessful in mediating their dispute, or if they choose not to mediate, they are free to proceed with their suit in the small claims court. Unlike Santa Barbara and Sacramento, there is no on-site mediation program.

iv. Charts Depicting Results of California Survey

As mentioned previously, surveys were sent out to California municipal and justice court judges, administrative officers of municipal courts, and clerks of county justice courts. The survey primarily asked the participants to "check the box" next to the answer that best described the situation at their court. In some instances, however, the participants were asked to "fill in the blank." One consequence of using "fill in the blank" questions is that it led to disparate responses. For example, in the first chart, some of the participants listed "conciliation" and "mitigation" as the methods of ADR utilized by the court.

	Refer or Provide Information about ADR	Sponsor or Participate in ADR	Arbitration, Mediation and Other					
			Mediation Only	Conciliation Only	Med & Conciliation	Med, Consol & Mitigation	Med, Consol, Arb (Binding & NonBinding)	Med & Arb (Non Binding)
No. Butte, Butte Cty	X	X						X
So Butte, Butte Cty	X	X						X
Burbank, L.A Cty	X	X			X			
Culver, L.A Cty	X	X			X			
Southeast, L.A Cty	X	X			X			
Newhall, L.A Cty	X	X			X			
Inglewood, L.A Cty	X	X			X			
Citrus, L.A Cty	X	X			X			
Marin, Marin Cty	X	X					X	
Sacramento, Sac Cty	X	X	X					
Sfernando, S H Cty	X	X	X					
San Diego, S D Cty	X	X				X		
No County, S D Cty	X	X	X					
South Bay, S D Cty	X	X				X		
El Cajon, S D Cty	X	X				X		
San Mat'o, S M Cty	X	X	X					
Santa Barbara, SB Cty	X	X			X			
Santa Maria, SB Cty	X	X	X					
Santa Cruz, SC Cty	X	X		X				
San Fran, SF Cty	X	X					X	
Ventura, Ventura Cty	X	X			X			
Yolo, Yolo Cty	X	X	X					

	Use to Regular Trial (same day) if ADR does not work		Percentage of Settlements Abandoned or Judgments Paid					
	Yes	No	25%	70%	80 85%	85%	90%	90 95%	100%
No Butte, Butte Cty		X							
So Butte, Butte Cty		X							
Burbank, L A Cty		X						X	
Culver, L A Cty								X	
Southeast, L A Cty	X							X	
Newhall, L A Cty		X				X			
Inglewood, L A Cty		X						X	
Citrus, L A Cty		X						X	
Main, Marin Cty		X							X
Sacramento, Sac Cty	X								
Stanislaus, Stl Cty	X		X						
San Diego, SD. Cty	X				X				
No. County, SD Cty		X			X				
South Bay, SD Cty	X				X				
El Cajon, SD Cty	X				X				
San Mateo, SM Cty		X					X		
Santa Barbara, SB Cty	X			X					
Santa Maria, SB Cty	X								
Santa Cruz, SC Cty		X							
San Fran, SF Cty		X							
Ventura, Ventura Cty		X							
Yolo, Yolo Cty		X							

	Courts Review Results of ADR		Percentage of Small Claims Cases Heard Under Alternative Programs Resulting in Settlement						
	Yes	No	25%	70%	75-80%	80-85%	85-90%	90%	95%
No Butte, Butte Cty		X							
So Butte, Butte Cty		X							
Burbank, L.A. Cty		X						X	
Culver, L.A. Cty		X						X	
Southeast, L.A. Cty		X						X	
Newhall, L.A. Cty		X						X	
Inglewood, L.A. Cty		X						X	
Citrus, L.A. Cty		X						X	
Marin, Marin Cty		X							X
Sacramento, Sac Cty								X	
Sfbernardino, SB Cty	X		X						
San Diego, SD Cty		X			X				
No County, SD Cty		X			X				
South Bay, SD Cty		X			X				
El Cajon, SD Cty		X			X				
San Mateo, SM Cty		X				X			
Santa Barbara, SB Cty	X			X					
Santa Maria, SB Cty							X		
Santa Cruz, SC Cty		X							
San Fran, SF Cty		X							
Ventura, Ventura Cty		X							
Yolo, Yolo Cty	X								X

	Attorneys Allowed		Length of ADR Session				
	Yes	No	0.5 Hour	0.5-1 Hour	1-1.5 Hours	1.5-2 Hours	2 Hours	2-3 Hours
No. Butte, Butte Cty	X							X
So Butte, Butte Cty	X							X
Burbank, L.A. Cty	X							X
Culver, L.A. Cty	X			X				
Southeast, L.A. Cty	X							X
Newhall, L.A. Cty	X							X
Inglewood, L.A. Cty	X							X
Chino, L.A. Cty	X							X
Marin, Marin Cty	X						X	
Sacramento, Sac Cty	X			X				
Sfthamedono, SD Cty		X	X					
San Diego, SD Cty	X						X	
No County, SD Cty	X						X	
South Bay, SD Cty	X						X	
El Cajon, SD Cty	X						X	
San Mateo, SM. Cty	X				X			
Santa Barbara, SB Cty	X			X				
Santa Maria, SB Cty	X			X				
Santa Cruz, SC Cty		X						X
San Fran, SF Cty								
Ventura, Ventura Cty	X							X
Yolo, Yolo Cty	X					X		

	Litigants Have Right To Appeal			Percentage of Small Claims Disputants Participating in the Alternative Program				
	Yes	No	Yes & No	Unknown	< 11%	4-5%	5%	10%	25%
No. Butte, Butte Cty	X			X					
So. Butte, Butte Cty	X			X					
Burbank, L.A. Cty	X								
Culver, L.A. Cty	X								
Southeast, L.A. Cty	X								
Newhall, L.A. Cty	X								X
Inglewood, L.A. Cty	X								
Citrus, L.A. Cty	X								
Marin, Marin Cty		X						X	
Sacramento, Sac Cty	X						X		
Affirmative, SD Cty		X			X				
San Diego, SD Cty	X								
No County, SD Cty	X								
South Bay, SD Cty	X								
El Cajon, SD Cty	X								
San Mateo, SM Cty	X					X			
Santa Barbara, SB Cty			X				X		
Santa Maria, SB Cty	X								
Santa Cruz, SC Cty	X								
San Fran, SF Cty	X								
Ventura, Ventura Cty	X				X				
Yolo, Yolo Cty	X								

	Where ADR Information is Given							Type of Program	
	Before Filing	At Filing	Before & at Filing	Before, at Filing & at Trial	Before, at Filing, at Trial & After Judgment	At Filing & During Trial	Thru Hearing Officer Prior to Night Court	Voluntary	Mandatory
No. Butte, Butte Cty	X							X	
So. Butte, Butte Cty	X							X	
Burbank, L.A Cty			X					X	
Culver, L.A Cty			X					X	
Southgate, L.A. Cty	X							X	
Newhall, L.A Cty		X						X	
Inglewood, L.A Cty			X					X	
Citrus, L.A Cty			X					X	
Marin, Marin Cty			X					X	
Sacramento, Sac Cty							X	X	
S/Bernardino, S B Cty			X					X	
San Diego, S D Cty					X			X	
No County, S D Cty			X					X	
South Bay, S D Cty					X			X	
El Cajon, S D Cty					X			X	
San Mateo, S M Cty				X				X	
Santa Barbara, S B Cty								X	X
Santa Maria, S B Cty						X		X	
Santa Cruz, S C Cty	X								
San Jose, S J Cty			X						
Ventura, Ventura Cty			X					X	
Yolo, Yolo Cty				X				X	

	ADR Personnel Requests/Training		Part Time vs Full Time Personnel		Paid & Unpaid ADR Personnel			Night &/or Weekend Sessions	
	Yes	No	Full & Part Time	Part Time	Unpaid	Paid	Both Paid & Unpaid	Yes	No
No Butte, Butte Cty	X			X			X	X	
So Butte, Butte Cty	X			X			X	X	
Burbank, L.A. Cty	X		X				X		X
Culver, L.A. Cty	X		X				X	X	
Southeast, L.A. Cty	X		X				X		X
Newhall, L.A. Cty	X			X			X	X	
Inglewood, L.A. Cty	X		X				X		X
Chino, L.A. Cty		X	X				X		X
Marin, Marin Cty	X		X				X		X
Sacramento, Sac Cty	X		X				X	X	
S/Bernardino, S.B. Cty	X			X		X		X	
San Diego, S.D. Cty	X		X				X	X	
No County, S.D. Cty					X			X	
South Bay, S.D. Cty								X	
El Cajon, S.D. Cty								X	
San Mateo, S.M. Cty	X		X				X	X	
Santa Barbara, S.B. Cty	X			X			X	X	
Santa Maria, S.B. Cty	X			X			X		X
Santa Cruz, S.C. Cty	X			X		X		X	
San Fran, S.F. Cty									
Ventura, Ventura Cty	X			X	X			X	
Yolo, Yolo Cty	X		X				X	X	

	Location of Programs			Information				
	Outside Court	Inside Court	In & Out	In Person or Phone	Person, Phone, Writing	In Person	In Person or Writing	In Writing	Bulletin Board
No Butte, Butte Cty	X						X		
So Butte, Butte Cty	X			X					
Burbank, L.A. Cty	X						X		
Culver, L.A. Cty	X				X				
Southgate, L.A. Cty	X						X		
Newhall, L.A. Cty		X			X				
Inglewood, L.A. Cty			X		X				
Clovis, L.A. Cty	X								X
Marin, Marin Cty		X			X				
Sacramento, Sac Cty	X					X			
Riverside, Riv Cty		X		X					
San Diego, SD Cty			X		X				
No County, SD Cty	X							X	
South Bay, SD Cty			X		X				
El Cajon, SD Cty			X		X				
San Mateo, SM Cty	X				X				
Santa Barbara, SB Cty			X	X					
Santa Maria, SB Cty		X				X			
Santa Cruz, SC Cty	X			X					
San Jose, SJ Cty	X				X		X		
Ventura, Ventura Cty	X							X	
Yolo, Yolo Cty	X				X				

C. Success and Problems in the Use of Mediation in Small Claims Courts

Overall, mediation programs in the small claims court appear to be quite successful in settling a substantial percentage of contested cases before trial. In a national survey, it was reported that small claims mediation programs successfully settled from fifty percent to about ninety-five percent of the mediated cases.[67] The USF Report indicated that, in California, while the rate at which responding ADR programs resolve the cases brought before them varies from twenty-five percent to ninety-five percent, it is generally about eighty percent.[68]

To some extent, at least in the California study, higher resolution rates correlate with the time spent on each case, which varies from thirty minutes (in the court with a twenty-five percent success rate) to two or three hours (in the two courts reporting a success rate of ninety-five percent).[69] The average time per case is under two hours.[70] This indicates that successful mediation programs are more labor-intensive than the relatively short hearings in adjudication of small claims. In many mediation programs the labor comes exclusively or primarily from volunteers. Where the labor is paid, it becomes more difficult to balance the trade-offs between the resolution benefits of mediating small claims against the cost to the state.[71]

Data from programs in other states indicate that litigant satisfaction with ADR programs is even higher than the settlement rates would imply, suggesting that many litigants whose cases do not settle are nonetheless satisfied with the efforts.[72] Litigants (especially plaintiffs)

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67. GOERDT, *supra* note 2, at xi.

68. USF REPORT, *supra* note 10, at 2.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id. But see* Neil Vidmar, *The Mediation of Small Claims Court Disputes: A Critical Perspective*, RESEARCH ON NEGOTIATION IN ORGANIZATIONS 187 (R.J. Lewicki, et al. eds., 1986) (questioning these satisfaction studies). Vidmar states that feelings of satisfaction with the outcome in these studies were not related to settlement versus adjudication, but primarily as to whether the hearing was perceived as fair. *Id.* at 203. He states that the "principal correlate of perceived fairness was the extent to which the party in question prevailed over his or her adversary," and goes on to say that observations of hearings and disputant perceptions suggest that settlements are frequently produced through coercion rather than conciliation; *see also* Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515 (1984); Neil Vidmar & Judith Short, *Social Psychological Dynamics in the Settlement of Small Claims Court Cases*, *in* PSYCHOLOGY AND LAW: TOPICS FROM AN INTERNATIONAL CONFERENCE, 267 (Dave J.

who went to mediation were more likely to be satisfied with the outcome of the case than litigants who went to trial.[73]

Mediation and other alternative procedures have their own potential limitations: (1) They may require a greater investment of time on the part of both the mediator and the parties to the dispute; (2) the coordination, supervision, and quality control of ADR services in small claims courts may require additional funding or the shifting of funds from an under-funded judicial system; and (3) alternative procedures may perpetuate, rather than eliminate, power imbalances between the parties.[74] Any use of mediation or other ADR techniques should take these potential pitfalls into account.

The Metrocourt Project, a recent empirical study of small claims proceedings in Bernalillo County, New Mexico, concluded that, in both adjudicated and mediated cases, minority claimants received less money than nonminorities and that minority respondents paid more. Ethnicity was even more predictive of outcomes in mediated cases than in adjudicated small claims cases. However, minority claimants and respondents consistently expressed more satisfaction with mediation than with adjudication. The Metrocourt Project also found that female respondents do better than males in mediation outcomes.[75]

Power imbalances, gender differences, and ethnicity may play a larger role in mediation than in adjudication. The informality and flexibility of mediation both lend to its attractiveness and its dangers. The potential disparities in mediated outcomes are difficult to document and will, no doubt, remain the subject of debate. However, the fear that informal procedures may disadvantage the less powerful is itself an issue that must be weighed in considering the greater use of mediation in lieu of adjudication.[76] The California findings, as well as those in other studies, suggest that mediation programs can be cost-effective in reducing the need for judges on small claims calendars while resolving disputes in a manner

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Muller et al. eds., 1984).

73. GOERDT, *supra* note 2, at xi.

74. *See* Trina Grillo, *The Mediation Alternative, Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (Mediation presents some serious dangers for those subordinated in society.). *But see* Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991).

75. UNIVERSITY OF NEW MEXICO CENTER FOR THE STUDY & RESOLUTION OF DISPUTES AND DISPUTES & STATISTICAL ANALYSIS CENTER, UNIV. OF N.M., THE METROCOURT PROJECT FINAL REPORT (Jan. 1993) [hereinafter THE METROCOURT FINAL REPORT].

76. *See* Grillo, *supra* note 74.

that is more likely to produce a satisfactory outcome for the litigants.[77] With these potential benefits and concerns in mind, suggestions as to how the resolution of small claims might be improved are next examined.

III. SUGGESTIONS FOR ALTERNATIVE FORUMS, MODELS, AND PROCEDURES IN RESOLVING SMALL CLAIMS

Following are some recommendations for alternative forums, models, and procedures for handling small claims.[78] Because the problems, resources, and interests of each state, county, and court are likely to be different, these recommendations are more of a menu from which choices may be made than a list of prescriptions. One recommendation is that states should encourage willing counties to experiment with designing and operating pilot programs using these ideas.[79]

While some of the ideas may require neither additional funding nor new resources to implement, others will place additional demands on courts. With the states' and counties' existing resources severely constrained, it is unrealistic to think that these ideas can be broadly or quickly implemented without additional help. This article, however, contains ideas that might be utilized by some courts with the will and the resources to do so, and hopefully it will provide a number of ideas to spark their own adaptations and innovations.[80]

Some common themes associated with the effective implementation of ADR in small claims courts include education of the parties, integration of ADR options into small claims court procedures, and attention to enforcement mechanisms. These are discussed below with some recommendations.

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77. GOERDT, *supra* note 2, at xii-xiii.

78. Unless otherwise noted, this section is the same as that detailed in the USF REPORT, *supra* note 10, at 8-14.

79. Court-annexed ADR programs are best done at the county level. Samuel F. Barnum & Steven J. Rosenberg, *Marin County Embraces Court Annexed ADR*, ADR NEWS ALERT 1 (Bancroft-Whitney 1993). These authors mentioned three reasons for this: 1) Dispute resolution programs are best designed for local conditions, including the nature of disputes and availability of dispute resolution providers in the community; 2) it is appropriate to establish programs on the local level so that the states can have the benefits of various programs for experimental purposes; 3) it is easier to initiate such programs at the local level unencumbered by the greater complexities associated with statewide implementation.

80. *Id.* at 6 (It is recommended that the particular ADR program implemented by the small claims court be well documented statistically so that other jurisdictions may benefit from the experience.).

A. Education

1. Educating Disputants

It is of utmost importance that potential small claims litigants be educated early and as fully as possible about the realities of the litigation process and about the available alternatives to that process. Disputants who fully understand both the potential and the limitations of the small claims adjudicatory process are less likely to be frustrated should they choose that process. Many potential litigants who are informed and educated about mediation alternatives to litigation may choose to mediate rather than to litigate. Only if the disputants fully understand what each process entails can it be said that they either had a real option to pursue ADR or that their choice to litigate was an informed one. The more complete and readily accessible this education is, the more successful are the courts' ADR programs.[81]

Recorded messages explaining what ADR is and making access to ADR simple should be available to anyone telephoning the court or small claims advisor. The Judicial Council, or comparable state-wide office, ought to prepare sample brochures that local courts can adapt. These brochures would explain available ADR and how the alternatives can be utilized.[82] Such brochures should be readily available to anyone visiting or telephoning the court or small claims advisor. Plaintiffs should also be required to sign a statement verifying that they have read the brochure prior to filing and should be required to serve it on defendants along with their complaints.

Because seeing visual images and hearing explanations can be more effective than reading, a relatively short (twenty to thirty minute) videotape could be prepared that explains what disputants can expect to encounter in small claims court and in mediation. This tape should also be readily available to disputants. Where courts can reasonably accommodate television sets, the tape should be played near the small claims windows. Because many households have VCRs, small claims courts staffs should

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81. *See generally* Barnum & Rosenberg, *supra* note 79. The Marin County Superior Court, in adopting MARIN COUNTY SUPER. CT. RULE 5, which provides for early court intervention to encourage the use of ADR, recognized the importance of informing clients as to this choice. When a complaint is filed, the plaintiff and defendant are informed of the ADR programs offered in Marin County, and their attorneys are required to review these programs with their clients. At the initial status conference, the attorneys must discuss the suitability of the case for some form of ADR. While the rule does not adopt a system of mandatory ADR, it is mandatory that the parties consider and discuss ADR.

82. *See* Folberg et al., *supra* note 30, at 384.

have an ample supply of these tapes to lend to potential filers or defendants. The courts can also cooperate with businesses or agencies that deal with the public and that might be willing to lend tapes to interested disputants on the same basis. Some courts might wish to experiment with explicitly and strongly advising, or perhaps even requiring, litigants to see the tape prior to filing or contesting a complaint. The production and distribution of an educational videotape could be funded by a corporation or foundation.

2. Education of Court Personnel

Lack of knowledge of ADR processes is a major factor hindering its use. This lack of knowledge is not limited to the parties. Attorneys and judges may not be knowledgeable about mediation and other ADR procedures.[83] The implementation of an ADR program in the small claims court requires an informed judiciary.[84]

Court personnel who deal with the public, including clerks and advisors, should be fully educated about ADR alternatives and should understand that informing the public about ADR is an important part of their jobs.[85] The state administrative office of the courts or other appropriate state offices might design a basic ADR course that localities can adapt to offer to court personnel. A recent report made the following observation:

> Education of court administrators and judges should focus on the differences between mediation and adjudication, the participatory nature of mediation and the possibility of creative solutions that deal with future relationships. This information can help ensure that they will be better advocates and wiser planners of mediation programs, better able to select cases appropriate for mediation and more expert at explaining

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83. Barnum & Rosenberg, *supra* note 79, at 4 (Although this comment was made about the civil courts in general, it would appear to hold true for the small claims courts, as well.).

84. Marin County Superior Court Judge Savitt believes it is important that judges actually see a mediation demonstration so that they can understand how and why the ADR process is so effective. Barnum & Rosenberg, *supra* note 79, at 5. In seeing an actual mediation, judges would have a deeper understanding of what has been called the "logic behind the magic of mediation." *Id.* (quoting Albie M. Davis, *The Logic Behind the Magic of Mediation*, NEGOTIATION J. 17 (Jan. 1989)).

85. Effective July 1, 1991, CAL. R. CT. 1725 states that "all small claims advisors shall receive training sufficient to ensure competence in the areas of . . . alternative dispute resolution programs. . . ."

mediation to parties and their attorneys.[86]

B. A Court-Integrated Mediation Approach

Several courts have implemented programs of mandatory mediation for some small claims cases, but none of these has been free from problems.[87] What follows are suggestions for the design of a program that might be adapted by courts in any state. Strong sentiments and good reasons exist that courts not require a separate trip to a mediator, either as a precedent to filing or after a case has been filed. Judges have been disturbed by the "prospect of either erecting anything that looks like a barrier to court access or requiring parties to pay for court-mandated services."[88] Nonetheless, courts should take steps to ensure that when litigants do come to the courthouse, they have the opportunity and are encouraged to take advantage of any ADR procedures that may be helpful.[89]

1. The Process

In cases where both parties appear, the parties will meet with a mediator prior to a hearing before the judge. At this meeting, the mediator can give a more meaningful explanation of how mediation works and can begin the mediation process. If, at any time, one or more parties choose to leave the mediation, the session will end, and the parties can go to a hearing. By holding this meeting immediately prior to a hearing, the court requires little extra of a litigant. The parties are already at the courthouse, and they can leave the meeting at any time they become convinced it will not be helpful. The meeting can effectively evolve into a voluntary postfiling mediation session that would avoid requiring a second trip to the courthouse. Unlike completely voluntary programs, a required

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86. Barnum & Rosenberg, *supra* note 79, at 4 n.15 (citing *Standards for Court-Connected Mediation Programs, in* CENTER FOR DISPUTE SETTLEMENT, THE INSTITUTE FOR JUDICIAL ADMINISTRATION, INC. (1992)).

87. *But see* D.C.'s commitment to mandatory mediation as explained in USF REPORT, *supra* note 10, app. A, at 31. In addition, mandatory conciliation is recommended by Gould, *supra* note 30, at 162 ("[M]andatory mediative process [before trial] might even save court time and will certainly make the adjudicator's role a much easier and much more effective one."). Elwell, *supra* note 25, at 478.

88. Folberg et al., *supra* note 30, at 371.

89. CONSUMER LAW SOURCEBOOK, *supra* note 4, at 80 (stating that in cases in which the parties are "at least willing to speak to each other, it may be beneficial for the judge to suggest that they discuss settlement outside the courtroom while their case is placed later on the calendar.").

meeting just prior to the court hearing would assure that the parties are aware of the mediation alternative.

If the parties are informed ahead of time that they will meet with a mediator prior to any hearing, they are more likely to be receptive to that meeting when it occurs. In order to enhance receptivity to the mediation process, a court must ensure that all disputants coming to the courthouse expect this process, rather than springing it upon them as a surprise after they have come to court for the sole purpose of an adversarial hearing. The courts should inform all litigants as early as possible that the small claims process necessitates a single trip to a courthouse and that the first order of business at the courthouse will be a mediation meeting at which the parties should attempt to resolve their dispute without a judicial hearing. As suggested earlier in the context of voluntary prefiling mediation programs, the parties should be informed and educated about mediation at every possible step and by every possible means, including brochures, telephone assistance, and videotapes.

2. An Alternative to the Process

Although the approach of using same-day mediation may be established as the norm in most counties, other counties willing to experiment should try other approaches. Some courts may wish, at the time of filing, to schedule a mediation session a week or two prior to the normal hearing date. Mediation sessions could take place in the courthouse in the evenings or during normal business hours. If mediation results in a settlement, the hearing date would be canceled. If not, the parties may have to make another trip to the courthouse. If that would be an undue inconvenience, appearances might be made by telephone conference call, or cases could be submitted on stipulated facts. As a last resort, some small claims court sessions might be scheduled for evening hours.

Establishing either a day-of-hearing or prior-to-hearing mediation program will not always be easy. First, before any mediation program can be implemented, skilled mediators must be available. Courts can rely, at least initially, on volunteers for this purpose. In some counties, if hearings and mediations can be scheduled at or near local dispute resolution centers funded under such programs as the Dispute Resolution Programs Act (DRPA),[90] volunteer mediators may be more readily

90. California's 1986 Dispute Resolution Programs Act, as amended in 1992, authorizes counties to increase filing fees to add an additional one to eight dollars in order to fund nonprofit dispute resolution programs (three dollars maximum in cases where monetary damages do not exceed $2,500). CAL. BUS. & PROF. CODE § 470.3 (West Supp. 1994).

available. If cases are grouped according to subject areas, it is likely that those cases most likely to prove receptive to mediation can also be grouped together so that volunteers can both limit their days of service and serve in the kinds of cases with which they are most familiar.

3. The Mediators

In some areas, existing state-funded mediation centers cannot be relied on to provide a sufficient number of well-trained volunteer mediators, and skilled volunteers will be scarce. Law schools and local bar groups may be another source for skilled volunteers. Some courts and other agencies have obtained grants for establishing mediation and mediation training programs, and local courts should apply for these grants. The states' administrative office of the courts or comparable office should either certify, provide or suggest mediation training programs which local courts could coordinate. In addition, if municipal and superior courts maintain lists of mediators to whom they refer cases, mediators on those lists might be encouraged to perform occasional volunteer service for small claims cases.

To the extent that litigants are required to meet with a mediator, the court must be assured of the quality of the mediators. Unfortunately, establishing appropriate criteria for the selection of volunteer mediators is only one of many potential constraints. Effective court-based mediation programs may require a representative of the court to take part in the selection, coordination, evaluation and supervision of the volunteer mediators.

4. The Administration

Each state court should appoint an ADR liaison judge who is familiar with ADR and with local ADR providers,[91] and this judge should oversee the court's ADR efforts. Of course, the ADR liaison judge could not be expected to individually monitor and coordinate all aspects of the program. Where a DRPA-funded agency or other community-based mediation program administers the program, the ADR liaison judge might oversee the programmatic involvement of the local provider organization.

The programs receiving these grants are selected by the court and must meet the standards set in the legislation, as well as standards adopted by the Dispute Resolution Advisory Council created by the legislation in the Department of Consumer Affairs. The grants may not exceed 50 percent of the dispute resolution programs' operating costs. *See* CAL. BUS. & PROF. CODE §§ 465-471.5 (West 1990).

91. *See* Folberg et al., *supra* note 30, at 398-99.

In other areas, the court might be required to retain an administrator to oversee the program. In any event, all courts should be encouraged to involve the ADR committee of the local bar association and appropriate representatives of the local ADR community in planning all aspects of a non-adjudicatory small claims program. Together, courts, bar associations, and non-lawyer dispute resolution professionals should develop criteria for qualifying to serve within the small claims program.[92] Such criteria should emphasize performance-based measures of skill and competence, client satisfaction and success rates in mediation.

C. Co-Mediation

The availability and use of skilled mediators may not always guarantee a fair result in mediated cases. In certain kinds of cases where there are pre-existing power imbalances, litigants may go to court specifically so that a third-party decision-maker can impose a result different from what the parties might arrive at between themselves. In the kinds of cases where significant power imbalances exist and where the weaker party would not be likely to understand his or her rights sufficiently to allow him or her to correct that imbalance, that party should have the option to pursue co-mediation in which the mediator is joined by an attorney knowledgeable in the subject matter of the dispute. That co-mediator could educate the parties about the likely consequences of adjudication, thereby helping to correct one source of power imbalance caused by inadequate knowledge of the law while preserving the parties' ability to utilize creative problem-solving and saving judicial time. If cases are grouped by subject area, attorneys might volunteer to co-mediate at the times that cases within their particular expertise are being heard. It is particularly important that the local bar association or a committee of attorneys help design and monitor such a program to avoid bar objections and concerns about conflicts of interest.

D. Enforcement Procedures to Encourage Payment of Judgments

Small claims plaintiffs frequently express concern and frustration about the difficulty of collecting judgments.[93] The enforcement process is time-consuming, expensive, and often unavailing; a judgment debtor can hide assets or place significant barriers in the path of creditors.

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92. *Id.* at 405.

93. Roger Rubin, Esq., Remarks at the Meeting of the Small Claims Court Committee of the Judicial Council of California (April 14, 1992) (unpublished).

The Model Small Claims Court Act, Section 8.2(1) recommends that the court, while parties are still under oath at the end of a trial, obtain information about the defendant's assets and arrange a plan for satisfaction of the judgment. Although this Act has been in existence since 1976, apparently few courts have adopted the practice of routinely obtaining financial information about defendant debtors.[94]

Where both parties have appeared, they should be given the option of having the assistance of a mediator in working out post-award settlement or payment during a thirty-day prejudgment period.[95] Mediators should be present at small claims hearings so that they can begin this process immediately after a ruling, and rulings should be made from the bench, when appropriate.

Integrating mediation with adjudication of small claims disputes raises important issues regarding enforcement. Studies regarding mediated agreements reveal that parties are more likely to abide by mediated agreements than they are to abide by court orders.[96] The parties' involvement in reaching an agreement makes them more invested in seeing

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94. GOERDT, *supra* note 2, at 29. It is puzzling to note that despite the two-year success of an "automatic disclosure" procedure in Maine (with automatically scheduled disclosure hearings to determine the assets and income of the defendant available to satisfy a judgment), ME. REV. STAT. ANN. tit. 738, § 7472(2) (repealed 1981), this provision was eliminated. Elwell & Carlson, *supra* note 25, at 451 (citing to Craig A. McEwen & Richard J. Maiman, *Coercion & Consent: A Tale of Two Court Reforms*, 10 LAW & POL'Y 3, 4-5 (1988)). However, court-based mediation also "improved compliance with small claims judgments and became a well-established part of the small claims process." *Id.*

95. In general, courts should allow a defendant 30 days to pay following an adverse judgment, in order to satisfy the judgment without it showing up on a credit report. The 30 day period would permit the plaintiff and defendant to negotiate terms for the satisfaction of the judgment and would provide an incentive for the defendant to pay promptly in order to keep the judgment off the defendant's credit record. The judgment would be considered final for purposes of appeal and for purposes of fast track reporting, but credit reporting agencies would be precluded from reporting on such judgments within the 30 day period. Achieving this result would require legislation.

96. *See* McEwen & Maiman, *supra* note 44 (Payment is more likely with mediated than with adjudicated settlements.). McEwen & Maiman ascribed these higher compliance rates to feelings of obligation arising from the fact that defendants with mediated settlements saw the resolution process as more fair and legitimate and thus felt a moral obligation to pay. *Id.* While Vidmar says these compliance rates may be misleading, because part of the result may be due to differences in admitted liability, and another part may be ascribed to the referee arranging specific payment plans, McEwen and Maiman acknowledged at least the special payment arrangements as being instrumental. Neil Vidmar, *The Mediation of Small Claims Court Disputes: A Critical Perspective*, *in* RESEARCH ON NEGOTIATION IN ORGANIZATIONS 187 (R.J. Lewicki, et al. eds., 1986); McEwen & Maiman, *supra* note 44, at 34. However, it appears this is just another benefit of mediating, because more creative arrangements in payments are made in that context than in the litigation context.

it hold, and parties who have participated in determining their own fate are less likely to undermine the outcome. Nonetheless, the consultants in the USF Report believe that mediated agreements should be able to be conveniently entered as court-ordered judgments and that plaintiffs should be encouraged to do so.[97] The result will be that, in the relatively smaller percentage of cases where defendants do not follow through with their settlements, plaintiffs will still be no worse off regarding enforcement than if they had litigated.

E. Funding

Funding will be needed to assist courts both in developing effective ways to educate disputants about ADR prior to filing and in establishing post-filing court-based ADR programs. In California, some funding may be available from the trust funds set aside for small claims programs. In California and elsewhere, funds may be available from grants from both private foundations and public agencies. In addition, the states' judicial councils might seek an increased filing fee for multiple filers or for cases involving claims of over $2,500 or some other designated amount. Finally, the states' judicial councils or administrative offices of the courts might design an incentive grant program under which counties that were willing to start pilot programs and that saved money as a result would be eligible for supplemental funding to expand their successful programs.

F. Other Suggestions

1. Statewide Coordination

Small claims advisors and small claims court administrators have developed innovative and successful ways to both make adjudication more efficient and ADR better understood and more available. Courts in each state will benefit from being assured that ideas are shared. Statewide administrative offices should develop and coordinate programs and, where possible, provide support and education to local courts.

2. Use of Expertise

One problem with setting up new ADR programs is that in some counties there is insufficient expertise to get a new program off the

97. USF REPORT, *supra* note 10, at 12.

ground. To help in this area, a state-wide administrative office or council might begin a "circuit rider program" in which a state court employee is available to individual rural counties for about three months, riding a circuit, to help start new ADR programs. The circuit rider would be familiar with other start-up efforts, would be knowledgeable about where grant or state funding may be located, and would have access to forms as well as training resources for volunteers and case developers. Through the circuit rider's relationships around the state, a network of fledgling programs could be encouraged to discuss common problems and useful techniques.

3. Coordination with Other State Agencies

Other state agencies, such as departments of consumer affairs, have consulted and developed some helpful expertise in establishing and administering ADR programs. Also, state bar associations, as well as the American Bar Association[98] have developed a clearinghouse of ideas by planning and implementing documents on ADR programs and other useful information. Through coordinated efforts, a depository of useful materials (including videotapes, training materials, reports, books, other publications, etc.) could be established at relatively modest cost with existing resources used to their maximum effect.

G. Use of Neighborhood Facilities

In many areas, it may be difficult to maximize the utility of mediators and pro-tem judges because courts simply do not have enough space. The availability of space, as well as the accessibility of the courts, could be enhanced by using conference rooms and other facilities in schools, shopping malls and other public places that would be convenient for parties.[99] Where hearings and perhaps even mediations are conducted outside a regular courtroom, a clerk or a bailiff may be required to assure that proper records are kept and order is maintained.[100]

The use of rooms other than formal courtrooms would not only alleviate the strain put on courts but would also benefit litigants. In many counties, the use of other buildings might allow for more convenient

98. The ABA Standing Committee on Dispute Resolution serves as an extensive clearinghouse on ADR programs and information. It is assumed this clearinghouse function will be sustained by the new ABA Section on Dispute Resolution.

99. *See* CAL. CIV. PROC. CODE § 116.250 (West Supp. 1993).

100. Such a program was operated successfully in Santa Clara County, California a few years ago.

transportation, parking, and evening hours. In addition to added convenience, an informal setting could provide other substantial benefits. Many small claims litigants are intimidated by having to stand up in a crowded formal room before a group of strangers and under considerable time pressure, describe the facts of their cases. Hearings conducted around conference tables in smaller, more informal, and less intimidating rooms could be a great relief to many.

Neighborhood buildings used as temporary courts might also house mediators and pro-tem judges from that neighborhood. The presence of pro-tem judges and mediators from the neighborhood located in a building in the neighborhood might overcome the perception on the part of some minority groups that the courts are removed from them and from their lives. These procedures might also facilitate use of mediators and pro-tems who speak the language of the growing number of non-English-speaking minorities, thereby greatly increasing their access to justice.

A study in New Mexico resulted in a determination that the use of minority mediators eliminated the negative impact on the size of monetary outcomes for minorities in mediation. Use of neighborhood settings for mediation of small claims cases should enhance the opportunities to utilize minority mediators who more closely match the ethnicity of disputants from the neighborhood.[101]

IV. CONCLUSION

Advance planning and a critical assessment of needs and purposes are the most important elements in determining the form of small claims ADR that will work best in a particular setting. For example, larger urban areas may consider mediation as an alternative to small claims courts because it offers opportunities to alleviate the courts' caseloads. This is the impetus in programs where court backlogs are clogging the system. Other reasons may include a desire to provide a method of dispute resolution that provides disputants with a greater sense of fairness or to take advantage of an alternative to the cost and frustration that accompany a court-imposed decision. Another common reason is that studies and experience have confirmed that mediated settlements are more likely to be honored by the parties,[102] compared to the all-too-common complaint that a judgment given by the court often cannot be collected or enforced.

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101. THE METROCOURT PROJECT FINAL REPORT, *supra* note 75.

102. *See* FOLBERG & TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE 9-13 (1984); McEwen & Maiman, *supra* note 44, at 34.

The resources available will, of course, play a major role in shaping the ADR program. Physical facilities that can be made available will make a difference in how a program is structured. Similarly, the potential or available pool of trained mediators is a significant consideration.[103] If the court has convenient access to a law school, opportunities for developing a program that will take advantage of students willing to become involved in the court's ADR processes are present. Courts that are isolated or distant from universities will be required to rely on other sources of mediators.

The availability of a separate mediation center provides the greatest opportunity for a court to "farm out" some of its small claims, but administrative problems and record-keeping costs may increase. Similarly, the court necessarily loses some control over the handling of cases.

For purposes of analysis and explanation, the USF consultants drew certain conceptual boundaries to aid in categorizing the programs the Report reviewed. These boundaries are simply arbitrary constructs. In reality, the labels "court-based" and "noncourt-based" represent only the poles of the options available. Many programs do not fit precisely into one category or the other. Programs tend to straddle conceptual lines, and it is common to find programs combining the features of both.

Similarly, the three time periods the Report used to define the mediation intervention points in small claims cases are not the exclusive points of intervention within particular programs. Most programs, in fact, intervene to a greater or lesser degree in more than one of the time periods, depending upon their primary goals and the resources available to achieve them.

As noted at the outset, no single ADR program will achieve the best possible results in every situation. However, the elements described are present to a greater or lesser extent in every mediation program.

Finally, the filing of formal civil complaints is still perceived as necessary to induce bargaining and to gain leverage with the other party.[104] For this reason, it is important that mediation procedures be tied into the small claims courts, as well as available independently of courts. Court-sponsored mediation can be used as a mechanism for re-establishing a disputant's control over "both the conflict and its resolution in the context of a new bargaining relationship."[105] The appearance of weakness sometimes associated with initiating settlement discussions can

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103. Joshua Rosenberg & Jay Folberg, *ADR in a Civil Justice Reform Act Demonstration District*, 46 STAN L. REV. (forthcoming July 1994).

104. McEwen & Maiman, *supra* note 44, at 46.

105. *Id.* at 47.

be avoided if, while waiting to be called in front of the small claims judge, the parties "give mediation a shot."

More individuals are becoming familiar with mediation, and more companies, large and small, have made it their standard procedure to mediate before litigating. Schools are teaching conflict resolution, and computer software is available to facilitate collaborative processes.[106] Increasingly, our society is coming to understand that there are many ways to effectively resolve disputes. In particular, small claims can, more often than not, be settled by the parties themselves.

106. LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 180 (1990).